IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2008

STATE OF TENNESSEE v. HOLLIS MERIWEATHER

Appeal from the Circuit Court for Montgomery County
No. 40500412 Michael R. Jones, II, Judge

No. M2007-02677-CCA-R3-CD - Filed October 1, 2008

The Defendant, Hollis Meriweather,[1] was convicted of two counts of the sale of cocaine in violation of Tennessee Code Annotated Section 39-17-417. The trial court denied his motion for a new trial. In this direct appeal, he makes the following claims: (1) that an impermissible variance existed between the crime charged in the indictment and the proof presented at trial; and (2) that the evidence introduced at trial was insufficient to convict him. We conclude that the Defendant's arguments lack merit. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Roger E. Nell, District Public Defender; and Gregory D. Smith, Contract Appellate Defender, Clarksville, Tennessee, for the appellant, Hollis Meriweather.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; John W. Carney, District Attorney General; and Chris Clark, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events at issue in this case took place on September 30 and October 1, 2004. At some time before those dates, members of Montgomery County's Drug Task Force (Task Force) learned of a man named Mike McCullough's willingness to act as a confidential informant (CI) in their

---

[1] In portions of the record, the Defendant's last name is spelled "Merriweather" or "Merriwether." It is the policy of this Court to spell the Defendant's name as it appears on the indictment.

jurisdiction. They planned to use McCullough as the purchaser in a "controlled buy" situation, in which a CI attempts to purchase drugs from a suspected dealer, reporting the results back to police.

Police had been investigating the Defendant as a potential cocaine dealer. On September 30, 2004, Task Force Agents Jessie Reynolds, J.T. Baggett, and Ivan Crockerell drove in an undercover car to a meeting with McCullough near the Defendant's house. McCullough, who did not have a valid driver's license, had been driven to the meeting by his girlfriend, Melissa Murr. Agents Reynolds and Baggett searched McCullough and Murr. They also searched the vehicle Murr drove to the meeting. The agents found no contraband. Agent Crockerell then equipped McCullough with an audio recording device designed to look like a pager and gave McCullough one hundred dollars for the purchase of drugs.

Murr then drove McCullough to the Defendant's house. The agents maintained visual contact at least until Murr and McCullough had turned onto the Defendant's street, at which point the agents pulled onto a nearby road to wait out of sight. While Murr waited in the car, the Defendant let McCullough into his house. McCullough asked the Defendant for a "fifty," a slang term for a certain amount of crack cocaine. The Defendant gave McCullough a plastic baggie with a number of white rocks in it.

McCullough paid the Defendant and left, returning with Murr to meet the police. He had been inside the Defendant's house for about three or four minutes. The purchased substance was placed in an evidence bag containing McCullough's CI name, the date, the accepting agent's initials, the case number, and the name of the Defendant. McCullough returned the audio recording device.

Similar events occurred the next day, October 1, 2004. The agents met McCullough and Murr at the local Conservation Club, where they again performed searches to confirm the absence of contraband. The agents again equipped McCullough with the audio recording device, and again kept visual contact with McCullough and Murr until sometime after they turned onto the Defendant's street. McCullough again entered the house, purchased another "fifty" from the Defendant, and with Murr, met the agents back at the Conservation Club shortly thereafter. McCullough and the agents went through the same inventory procedures. McCullough again returned the audio recording device.[2] The agents paid McCullough one hundred dollars for each controlled buy, for a total of two hundred dollars as compensation for his assistance.

The agents delivered both baggies to Agent Edward Black, who acted as custodian of the evidence. Agent Black then personally delivered the baggies to the Tennessee Bureau of Investigation (TBI) for testing. TBI forensic scientist Cassandra Franklin tested the substance purchased during the September 30 controlled buy. She found that this first baggie contained .6 grams of a substance containing cocaine. TBI forensic scientist Mark Dunlap tested the substance

[2]The State played the audiotapes from both controlled buys at trial, but the recordings were largely indecipherable.

purchased during the October 1 controlled buy. He found that this second baggie contained .5 grams of a substance containing cocaine.

The jury returned verdicts of guilty on two counts of the sale of .5 grams or more of cocaine. The trial judge sentenced the Defendant to twelve years for each count, to be served concurrently in the Tennessee Department of Correction. The Defendant appeals.

Analysis

I. Variance between Indictment and Proof

The Defendant first argues that an impermissible variance exists between the allegation in Count III of the indictment and the proof presented at trial. The Tennessee Code Annotated section under which the Defendant was convicted makes it a Class B felony to sell ".5 grams or more of any substance containing cocaine." Tenn. Code Ann. § 39-17-417(c)(1) (emphasis added). Count III, instead of simply duplicating the statutory language above, alleges that the Defendant "unlawfully, feloniously and knowingly did deliver a controlled substance, to-wit: over .5 gm. of Cocaine, as classified in Section 39-17-408 of the Tennessee Code Annotated, to a confidential informant, in violation of the TCA 39-17-417." (Emphasis added). There exists, therefore, a variance between the actual language of the statute and the violation as charged in the indictment. By virtue of being ".5 grams or more," the Defendant's October 1, 2004 sale of exactly .5 grams of cocaine base violated the prohibition of Tennessee Code Annotated section 39-17-417(c)(1). Because the proof did not show "over .5" grams, however, the Defendant's conduct did not violate the language actually included in Count III of the indictment. As a result of this variance, he requests that his conviction be amended to the lesser included offense of sale of cocaine under .5 grams.

Tennessee no longer follows the early common law rule requiring the indictment and the proof to conform in all respects. State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). "[B]efore a variance will be held to be fatal it must be deemed to be material and prejudicial." Id.

a. Prejudice

The Tennessee Supreme Court has outlined the following rule for assessing whether a variance is prejudicial:

> Unless substantial rights of the defendant are affected by a variance, he has suffered no harm, and a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense; all other variances must be considered to be harmless error.

Id.; see also Berger v. United States, 295 U.S. 78, 82 (1935) (announcing the rule adopted in Moss).

We must first determine, therefore, whether Count III of the indictment sufficiently informed the Defendant of the charges against him. We first note that Count III only charges the Defendant under "TCA 39-17-417," which outlines the penalties for manufacture, delivery, sale, or possession of controlled substances. See Tenn. Code Ann. § 39-17-417. The indictment fails to specify the subsection under which the Defendant is being charged. It also does not explicitly say which class of felony is being charged.

Nevertheless, the indictment sufficiently informed the Defendant that he was charged with a Class B felony for the sale of cocaine. Sale of "over .5" grams of cocaine, as alleged in the indictment, falls within the Class B felony range under Tennessee Code Annotated section 39-17-417(c)(1). The jury convicted the Defendant under exactly this code section at trial, despite the fact that his conviction was for the sale of .5 grams of cocaine rather than "over" that amount. The code section under which the Defendant was convicted at trial, therefore, is the exact same code section that the indictment fairly informed the Defendant he was charged with violating. Under these circumstances the Defendant cannot credibly claim the variance rendered him unable to prepare a defense. He also cannot claim to have been misled by the indictment or surprised by the proof offered at trial.

We must next determine whether the variance is such that the Defendant could be prosecuted again for the same offense. It is not. The indictment and the proof offered at trial establish that the State prosecuted the Defendant for an October 1, 2004 sale of .5 grams of cocaine to a confidential informant. The variance here does nothing to obscure the precise conduct prosecuted in this case, and therefore, does not create the risk of a second prosecution for that conduct. Accordingly, we conclude that the variance was not prejudicial.

b. Materiality

Even if the variance had been prejudicial, it must also have been material in order to provide relief to the Defendant. Moss, 662 S.W.2d at 592. The Moss requirements for materiality and prejudice are nearly identical. The only difference is that, in order for a variance to be material, the proof at trial must fail to substantially correspond to the indictment. Id. Such a failure would take place only when "the prosecutor has attempted to rely at the trial upon theories and evidence that were not fairly embraced in the allegations made in the indictment." State v. Mayes, 854 S.W.2d 638, 640 (Tenn. 1993) (citing Russell v. United States, 369 U.S. 749, 763 (1962)). In this case, proof of the sale of .5 grams of cocaine did, however, substantially correspond to an indictment for sale of over .5 grams of cocaine and did not require the State to use unforeseen theories or evidence at trial. We therefore conclude that the variance was not a material one.

Because the variance between Count III of the indictment and the proof offered at trial was neither prejudicial nor material, we deny the Defendant's request to modify his conviction to the lesser included offense of sale of under .5 grams of cocaine. This issue has no merit.

II. Sufficiency of the Evidence

Next, the Defendant argues that the evidence is insufficient to support his convictions. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-17-408(b)(4) classifies cocaine as a controlled substance. Section 39-17-417(a)(3) provides that it is an offense for a defendant to knowingly sell a controlled substance. Section 39-17-417(c)(1), the punishment provision, provides that sale of "[c]ocaine . . . is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine."

The confidential informant testified at trial that on both September 30 and October 1, 2004, he gave the Defendant money in exchange for baggies containing a white, rock-like substance. Although the Defendant forcefully argues that this witness's credibility is woefully lacking, we again emphasize that any question about the credibility of this witness was resolved by the jury in the State's favor. Agent Black testified that he delivered both baggies to the TBI, where forensic scientists confirmed their contents, respectively, as .6 grams of a substance containing cocaine and .5 grams of a rock-form substance containing cocaine. Having reviewed this evidence, we find it sufficient to support the Defendant's convictions for the sale of .5 grams or more of a substance containing cocaine beyond a reasonable doubt.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

_____

DAVID H. WELLES, JUDGE